



State of Oregon
Department of
Environmental
Quality

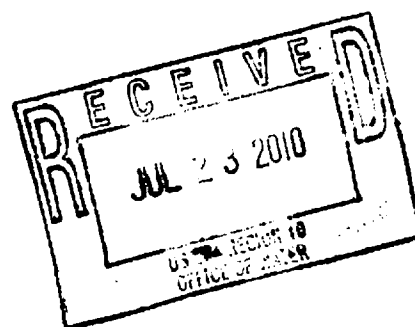


Oregon Department of Land
Conservation and Development

July 21, 2010

Mike Bussell
USEPA Region 10
Office of Water and Watersheds
1200 Sixth Avenue, OWW-135
Seattle, WA 98101

John King
Office of Coastal Resource Management
National Ocean and Atmospheric Administration
1305 East West Highway #11305
Silver Spring, MD. 20910



RE: Oregon Department of Environmental Quality's Response to the EPA and NOAA's Conditions of Fully Approving Oregon's Coastal Nonpoint Program (CNPCP), submitted by letter dated May 12, 2010.

Dear Mr. Bussell and Mr. King:

This is to provide an update of the Oregon Department of Environmental Quality's (DEQ) progress in response to the U.S. Environmental Protection Agency (EPA) and National Ocean and Atmospheric Administration (NOAA)'s Conditions of Fully Approving Oregon's Coastal Nonpoint Program (CNPCP) letter dated May 12, 2010 (**Attachment A**). Your May 12, 2010 letter identified three management measures in Oregon's CNPCP that had not yet been approved and contained requirements for what DEQ must do to address the deficiencies.

ONSITE SEWAGE DISPOSAL SYSTEMS (OSDS)

EPA and NOAA Requirements:

1. *"Adopt new rules requiring regular inspections for OSDS. Inspecting the systems at time of property transfer by trained/certified inspectors as laid out in Oregon's October 29, 2009 draft strategy is sufficient. Please provide NOAA/EPA with a copy of the draft rules to review to ensure the final rules will meet Coastal Nonpoint Program requirements."*

Timeline in May 12, 2010 EPA/NOAA Letter:

- **November 30, 2010:** Policy Option Package for Rules Development completed.
- **January 2011 through June 2011:** Request funding from the 2011 Oregon Legislature to support time-of-sale inspections for OSDS.
- **June through December 2012:** Provide draft(s) of rule language to NOAA and EPA for review/comment.
- **December 31, 2012:** Rule development completed.
- **January 31, 2013:** Submit new rules to NOAA and EPA for review/approval.
- **March 2013:** Rule implementation and inspections begin.

DEQ Activities to Meet EPA & NOAA Requirements:

DEQ has reviewed the milestones listed and is committed to meeting these milestones. DEQ will keep NOAA and EPA informed throughout the rule making process and share rule information and drafts during that process.

The Onsite Advisory Committee recommended to proceed with rulemaking to address EPA and NOAA's comments. DEQ has developed a Policy Option Package and will submit in the agency's request budget to the Governor's office.

DEQ Timeline: DEQ is currently meeting the EPA and NOAA timelines.

- **November 30, 2010:** Policy Option Package for Rules Development completed (on schedule).
- **January 2011 through June 2011:** Request funding from the 2011 Oregon Legislature to support time-of-sale inspections for OSDS (on schedule).
- **June 2011 through December 2012:** Provide draft(s) of rule language to NOAA and EPA for review/comment (on schedule).
- **December 31, 2012:** Rule development completed (on schedule).
- **January 31, 2013:** Submit new rules to NOAA and EPA for review and CNPCP approval (on schedule).
- **March 2013:** Rule implementation and inspections begin (on schedule).

NEW DEVELOPMENT

EPA and NOAA Requirements:

1. *“Complete TMDL Implementation Guidelines for the Coastal Nonpoint Program management area that incorporate the new development management measure requirements or practices consistent with the new development measure. Please provide NOAA and EPA with drafts of the guidance to review to ensure the final product will meet Coastal Nonpoint Program requirements.*
2. *Submit a strategy and schedule for completing and updating TMDL Implementation Plans within the Coastal Nonpoint Program management area to be consistent with the new TMDL Implementation Guidance.”*

Timeline in May 12, 2010 EPA/NOAA Letter:

- ***June 30, 2010:** Initial draft guidance document completed and provided to NOAA and EPA for review and comment.*
- ***December 31, 2010:** Final draft guidance document completed and provide to NOAA and EPA for review and comment.*
- ***March 31, 2011:** Public review of final draft guidance document completed.*
- ***June 30, 2011:** Final guidance document released and submitted to NOAA and EPA, along with strategy and schedule for updating TMDL Implementation Plans.*
- ***June/July 2011:** Workshops for Designated Management Agencies begins.*

DEQ Activities to Meet EPA & NOAA Requirements:

DEQ has developed the table of contents and is making progress on a draft of the “*Water Quality Implementation Plan Guidance for Urban/Rural Residential Land Uses within the Coastal Area*.” The table of contents was developed with input from the newly formed DEQ CNPCP New Development staff workgroup with representatives from the following DEQ water programs: stormwater, drinking water, TMDL, and NPS HQ staff, and regional basin coordinators.

DEQ Timeline: DEQ proposes a date of August 30, 2010, for submittal of the draft guidance to EPA and NOAA. The other timeframes should be met by DEQ.

- ***June 30, 2010:** Initial draft guidance document completed and provided to NOAA and EPA for review and comment (will be submitted by August 30, 2010).*
- ***December 31, 2010:** Final draft guidance document completed and provide to NOAA and EPA for review and comment (on schedule).*
- ***March 31, 2011:** Public review of final draft guidance document completed (on schedule).*
- ***June 30, 2011:** Final guidance document released and submitted to NOAA and EPA, along with strategy and schedule for updating TMDL Implementation Plans (on schedule).*
- ***June/July 2011:** Workshops for Designated Management Agencies begins (on schedule).*

ADDITIONAL MANAGEMENT MEASURES FOR FORESTRY

EPA and NOAA Requirements:

1. *"Commit to the prescriptive TMDL, Implementation Plan, and "safe harbor" BMP approach ("Option 1" under the State's proposal) that will satisfy the additional management measures for forestry condition, specifically addressing riparian and landslide-prone areas, and road Issues.*
2. *Provide a legal opinion from the Oregon Attorney General's Office that clearly concludes Oregon DEQ has the authority to prevent nonpoint source pollution and require implementation of the additional management measures for forestry. Specifically, under the state's current proposal, the legal opinion must conclude that DEQ has the authority to enforce TMDLs, including "safe harbor" BMPs, with regard to riparian buffers, landslide prone areas, and legacy roads.*
3. *Provide a more detailed description of the new prescriptive TMDL process. This revised description should:*
 - a. *Clarify the mechanism DEQ plans on using to require prescriptive, "safe harbor" BMPs. Will the BMPs (or possibly a menu of "safe harbor" BMPs to select from) be placed in the TMDLs themselves or only included in the TMDL Implementation Plans? Does DEQ's enforcement authority apply to both TMDLs and Implementation Plans?*
 - b. *Briefly describe how the prescriptive TMDL approach will address NOAA and EPA's concerns with landslide prone areas and road density and maintenance, particularly on "legacy roads". During our January 14th meeting/conference call, the state discussed the potential use of DOGAMI LIDAR coverages, Relative Bed Stability, and GRAIP methodologies to assess, target, and address landslide prone areas and road issues in support of the new prescriptive TMDL process. DEQ should briefly describe these methodologies and/or others and how they will be used in the new TMDL process. The description should include how these tools will help target and, where needed, develop "safe harbor" BMPs.*
 - c. *Provide a few examples of the types of "safe harbor" BMPs Oregon would use to address our concerns about adequate protection of riparian and landslide-prone areas and management/maintenance of forestry roads, specifically legacy roads, and meet load allocations and surrogate targets. We recognize that the BMPs could vary from parcel to parcel based on the site conditions but we need a reasonable assurance that the types of "safe harbor" BMPs Oregon is developing link to, and would meet, water quality standards and protect beneficial uses. For example, requirements for restricting harvest intensities and methods on high risk landslide prone areas should be described along with the triggers or thresholds for their application. We recommend providing comparable examples of harvest restrictions on high risk landslide prone areas such as those applied under the Washington*

Forests and Fish rules as well as the harvest restrictions under the Oregon Forest Practices Act rules related to high risk landslide areas above roads and buildings. The Northwest Forest Plan also includes measures for landslide prone areas that DEQ could consider.

- d. *Briefly describe DEQ's approval/disapproval process for TMDL Implementation Plans. To address the additional management measures for forestry condition, decisions to approve or disapprove need to be based on the plan's ability to meet load allocations or surrogate targets. If DEQ's decisions are based on a basin-specific rule adopted by BOF, then such rule must have the ability to meet load allocations or surrogate targets.*
4. *Provide a schedule for developing new prescriptive TMDLs and safe harbor BMPs and updating existing TMDLs and Implementation Plans within the 6217 boundary following the new prescriptive TMDL process.*
5. *Complete and submit to EPA and NOAA a prescriptive TMDL that includes safe harbor BMPs and a TMDL Implementation Plan for the Mid-Coast basins and that addresses the outstanding additional management measures for forestry condition."*

Timeline in May 12, 2010 EPA/NOAA Letter:

- **June 30, 2010:** *Submit a legal opinion from Oregon's Attorney General's Office (Item 2).*
- **September 30, 2010:** *Provide commitment that Oregon will pursue prescriptive TMDL process for addressing the additional management measures for forestry condition (Item 1).*
- **January 31, 2011:** *Provide additional detail on the prescriptive TMDL process (Item 3).*
- **March 31, 2011:** *Provide a schedule for implementing the prescriptive TMDL approach throughout the Coastal Nonpoint Program management area which includes a time line for developing new TMDLs as well as updating existing TMDLs (Item 4).*
- **June 30, 2012:** *Complete and submit prescriptive TMDLs and TMDL Implementation Plans for Mid-Coast basins (Item 5).*

DEQ Activities to Meet EPA & NOAA Requirements:

Item 1.

DEQ is developing an issue paper and guidance on Implementation Ready TMDLs (on schedule). Implementation Ready TMDLs is a term that better describes the type of TMDLs we will be developing and meets prescriptive TMDL requirements.

Item 2.

A legal opinion from Oregon's Attorney General's Office (**Attachment B**) has been prepared that states:

"We conclude that DEQ is required to develop and implement LAs for nonpoint sources of pollution, including, where applicable, pollutant loads from operations on state and private forest lands. In fulfilling this legal requirement, DEQ is authorized to establish

allocations for individual nonpoint sources. Based on the assumptions set out above, we conclude that the law would allow DEQ to identify BMPs or other control measures needed to implement source specific LAs, including forest operations. In keeping with statutory directives and the policies in the EQC's TMDL rules, however, the BOF would be given an opportunity to adopt new BMPs or control measures that are as effective as safe harbor BMPs and that would be implemented by ODF. If the BOF does not promulgate such implementation measures, DEQ has authority to directly order compliance with the load allocation because such measures are required by the CWA."

The 303(d) listings in Oregon are done based on waterbody segments but TMDLs are developed, where appropriate, on a watershed basis. DEQ develops a TMDL and allocates waste loads for point sources and load allocations for nonpoint sources for those sources identified through the TMDL process as significant. The Department of Forestry develops statewide practices for forest operations which are used for private forest management in the Mid-Coast basin. ODF can also develop basin practices but basin specific practices have not been developed in the Mid-Coast basin. Once a TMDL is completed and waste load and load allocations are developed DEQ sends an order to the Designated Management Agency responsible for that sector and request an implementation plan.

Item 3.

DEQ will respond to this request for *"additional detail on the prescriptive TMDL process"* by the due date required.

Items 4 and 5.

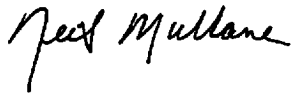
The following Mid Coast subbasins and pollutant parameters will have Implementation Ready TMDLs developed by June 30, 2012: Alsea, Siletz, Siltcoos, Siuslaw, and Yaquina subbasins. Implementation Ready TMDLs will be developed in these subbasins for temperature and bacteria. Sediment will be addressed thru a separate process but will be consistent with the Implementation Ready TMDL approach.

DEQ Timeline: DEQ is currently meeting or exceeding the EPA and NOAA timelines.

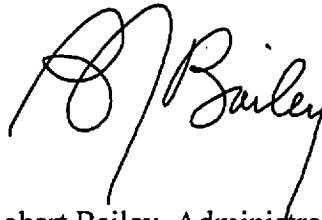
- ***June 30, 2010: Submit a legal opinion from Oregon's Attorney General's Office (Item 2) (Attachment B).***
- ***September 30, 2010: Provide commitment that Oregon will pursue Implementation Ready TMDL process for addressing the additional management measures for forestry condition (Item 1) (on schedule).***
- ***January 31, 2011: Provide additional detail on the Implementation Ready TMDL process (Item 3) (on schedule).***
- ***March 31, 2011: Provide a schedule for implementing the Implementation Ready TMDL approach throughout the Coastal Nonpoint Program management area which includes a time line for developing new TMDLs as well as updating existing TMDLs (Item 4) (on schedule).***
- ***June 30, 2012: Complete and submit Implementation Ready TMDLs and TMDL Implementation Plans for Mid-Coast basins (Item 5) (on schedule).***

Questions regarding this submittal should be directed to Don Yon of DEQ at (503) 229-6850.

Sincerely,



Neil Mullane, Administrator
Water Quality Division
Department of Environmental Quality



Robert Bailey, Administrator
Coastal Division
Department of Land Conservation and Development

cc: Don Waye, EPA HQ
David Powers, EPA Region 10
Allison Castellan, NOAA HQ
Don Yon DEQ
Amanda Punton, DLCD
Eugene Foster, DEQ HQ

Attachement A



U.S. Department of Commerce
National Oceanic and Atmospheric
Administration



U.S. Environmental
Protection Agency

Neil Mullane
Administrator
Water Quality Division
Department of Environmental Quality
811 SW Sixth Avenue
Portland, Oregon 97204

MAY 12 2010

Bob Bailey
Administrator
Coastal Division
Department of Land, Conservation and
Development
635 Capitol Street, NE, Suite 153
Salem, Oregon 97301

Dear Mr. Mullane and Mr. Bailey:

The Environmental Protection Agency (EPA) and National Oceanic and Atmospheric Administration (NOAA) have been working closely with you and your staff to address the remaining conditions on Oregon's Coastal Nonpoint Pollution Control Program (Coastal Nonpoint Program). We are very pleased with the progress that has been made. Over the past several months, we have had several meetings and conversations to discuss Oregon's October 29, 2009 draft approach to receive full approval of its Coastal Nonpoint Program; the state shared with us in January. We would like to take this opportunity to formally follow up on the state's proposal and clarify what EPA and NOAA would need from the state before we are able to consider fully approving Oregon's Coastal Nonpoint Program.

We are highly supportive of Option #1, the prescriptive TMDL approach, extended to address all three outstanding forestry issues, for meeting the additional management measures for forestry, as well as the two strategies you laid out for satisfying the new development and onsite disposal system conditions. We believe these approaches could enable the state to receive full approval of its Coastal Nonpoint Program. However, additional clarification and details are needed before we can make a final decision.

The enclosed attachment lists the information Oregon must provide and timeline for doing so before EPA and NOAA would be able to approve Oregon's program. We recognize that some of these items may be challenging and require time to complete. EPA and NOAA developed the timeline in consultation with state staff to ensure due dates were reasonable yet keep the process moving forward. If sufficient progress is not being made, EPA and NOAA may disapprove Oregon's program and withhold a portion of the state's Clean Water Act Section 319 and Coastal Zone Management Act Section 306 funding pursuant to 16 U.S.C. § 1455b(c).

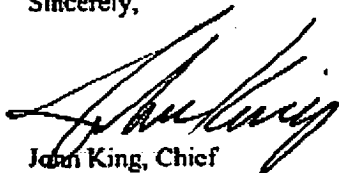
After careful consideration, EPA and NOAA no longer believe pursuing a change to the Forest Practices Act (Option #2) is a viable option at this time. It would take years for the rule change process to play out and there is no certainty the resource-intensive effort would ultimately result in substantive rule changes to address NOAA and EPA's remaining forestry concerns: adequate protection of riparian and landslide-prone areas, and management/maintenance of forestry roads impairing water quality, particularly legacy roads.

As always, EPA and NOAA look forward to continuing to work with you to address the remaining conditions on your Coastal Nonpoint Program. Please let us know if there is any specific assistance you need. For example, we would be happy to provide existing reports and data, and/or comparable examples on how the outstanding additional management measures for forestry can be met. NOAA's National Marine Fisheries Service could also provide information on forest management strategies that will help protect aquatic species, including salmon.

We encourage you to share proposed riparian, landslide, and legacy road best management practices (BMPs) as well as drafts of the onsite disposal system rules and TMDL Implementation Guidance with us to review. Early NOAA and EPA feedback will help ensure the BMPs, onsite rules, and TMDL Implementation Guidance will help to protect water quality and aquatic resources and satisfy the conditions on the state's Coastal Nonpoint Program.

Please contact either Dave Powers of EPA Region 10 at (503) 326-5874 or Allison Castellan of NOAA at (301) 563-1125 if you have questions.

Sincerely,



Joan King, Chief
Coastal Programs Division
Office of Ocean and Coastal Resource
Management
National Oceanic and Atmospheric Administration



Mike Bussell, Director
Office of Water and Watersheds
Environmental Protection Agency,
Region 10

Enclosure

cc: Don Yon, OR DEQ
Amanda Punton, OR DLCD
Eugene Foster, OR DEQ HQ
Don Wayc, EPA HQ
Dave Powers, EPA R10
Allison Castellan, NOAA

Attachment

What NOAA and EPA Need from Oregon for Coastal Nonpoint Program Approval

OSDS:

1. Adopt new rules requiring regular inspections for OSDS. Inspecting the systems at time of property transfer by trained/certified inspectors as laid out in Oregon's October 29, 2009 draft strategy is sufficient. Please provide NOAA/EPA with a copy of the draft rules to review to ensure the final rules will meet Coastal Nonpoint Program requirements.

Timeline:

- **November 30, 2010:** Policy Option Package for Rules Development completed.
- **January 2011 through June 2011:** Request funding from the 2011 Oregon Legislature to support time-of-sale inspections for OSDS.
- **June through December 2012:** Provide draft(s) of rule language to NOAA and EPA for review/comment.
- **December 31, 2012:** Rule development completed.
- **January 31, 2013:** Submit new rules to NOAA and EPA for review/approval.
- **March 2013:** Rule implementation and inspections begin.

New Development:

1. Complete TMDL Implementation Guidelines for the Coastal Nonpoint Program management area that incorporate the new development management measure requirements or practices consistent with the new development measure. Please provide NOAA and EPA with drafts of the guidance to review to ensure the final product will meet Coastal Nonpoint Program requirements.
2. Submit a strategy and schedule for completing and updating TMDL Implementation Plans within the Coastal Nonpoint Program management area to be consistent with the new TMDL Implementation Guidance.

Timeline:

- **June 30, 2010:** Initial draft guidance document completed and provided to NOAA and EPA for review and comment.
- **December 31, 2010:** Final draft guidance document completed and provide to NOAA and EPA for review and comment
- **March 31, 2011:** Public review of final draft guidance document completed.
- **June 30, 2011:** Final guidance document released and submitted to NOAA and EPA, along with strategy and schedule for updating TMDL Implementation Plans.
- **June/July 2011:** Workshops for Designated Management Agencies begins.

Additional Management Measures for Forestry:

1. Commit to the prescriptive TMDL, Implementation Plan, and "safe harbor" BMP approach ("Option 1" under the State's proposal) that will satisfy the additional management measures for forestry condition, specifically addressing riparian and landslide-prone areas, and road issues.

2. Provide a legal opinion from the Oregon Attorney General's Office that clearly concludes Oregon DEQ has the authority to prevent nonpoint source pollution and require implementation of the additional management measures for forestry. Specifically, under the state's current proposal, the legal opinion must conclude that DEQ has the authority to enforce TMDLs, including "safe harbor" BMPs, with regard to riparian buffers, landslide-prone areas, and legacy roads.
3. Provide a more detailed description of the new prescriptive TMDL process. This revised description should:
 - a. Clarify the mechanism DEQ plans on using to require prescriptive, "safe harbor" BMPs. Will the BMPs (or possibly a menu of "safe harbor" BMPs to select from) be placed in the TMDLs themselves or only included in the TMDL Implementation Plans? Does DEQ's enforcement authority apply to both TMDLs and Implementation Plans?
 - b. Briefly describe how the prescriptive TMDL approach will address NOAA and EPA's concerns with landslide prone areas and road density and maintenance, particularly on "legacy roads." During our January 14th meeting/conference call, the state discussed the potential use of DOGAMI LIDAR coverages, Relative Bed Stability, and GRAIP methodologies to assess, target, and address landslide prone areas and road issues in support of the new prescriptive TMDL process. DEQ should briefly describe these methodologies and/or others and how they will be used in the new TMDL process. The description should include how these tools will help target and, where needed, develop "safe harbor" BMPs.
 - c. Provide a few examples of the types of "safe harbor" BMPs Oregon would use to address our concerns about adequate protection of riparian and landslide-prone areas and management/maintenance of forestry roads, specifically legacy roads, and meet load allocations and surrogate targets. We recognize that the BMPs could vary from parcel to parcel based on the site conditions but we need a reasonable assurance that the types of "safe harbor" BMPs Oregon is developing link to, and would meet, water quality standards and protect beneficial uses. For example, requirements for restricting harvest intensities and methods on high risk landslide prone areas should be described along with the triggers or thresholds for their application. We recommend providing comparable examples of harvest restrictions on high risk landslide prone areas such as those applied under the Washington Forests and Fish rules as well as the harvest restrictions under the Oregon Forest Practices Act rules related to high risk landslide areas above roads and buildings. The Northwest Forest Plan also includes measures for landslide prone areas that DEQ could consider.
 - d. Briefly describe DEQ's approval/disapproval process for TMDL Implementation Plans. To address the additional management measures for forestry condition, decisions to approve or disapprove need to be based on the plan's ability to meet load allocations or surrogate targets. If DEQ's decisions are based on a basin-specific rule adopted by BOF, then such rule must have the ability to meet load allocations or surrogate targets.

4. Provide a schedule for developing new prescriptive TMDLs and safe harbor BMPs and updating existing TMDLs and Implementation Plans within the 6217 boundary following the new prescriptive TMDL process.
5. Complete and submit to EPA and NOAA a prescriptive TMDL that includes safe harbor BMPs and a TMDL Implementation Plan for the Mid-Coast basins and that addresses the outstanding additional management measures for forestry condition

Timeline:

- **June 30, 2010:** Submit a legal opinion from Oregon's Attorney General's Office (Item 2).
- **September 30, 2010:** Provide commitment that Oregon will pursue prescriptive TMDL process for addressing the additional management measures for forestry condition
- **January 31, 2011:** Provide additional detail on the prescriptive TMDL process (Item 3).
- **March 31, 2011:** Provide a schedule for implementing the prescriptive TMDL approach throughout the Coastal Nonpoint Program management area which includes a timeline for developing new TMDLs as well as updating existing TMDLs.
- **June 30, 2012:** Complete and submit prescriptive TMDLs and TMDL Implementation Plans for Mid-Coast basins.

Attachement B

JOHN R. KROGER
Attorney General



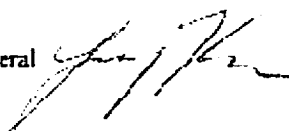
MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: July 2, 2010

TO: Neil Mullane, Water Quality Division Administrator
Department of Environmental Quality

FROM: Larry Knudsen, Senior Assistant Attorney General
Natural Resources Section 

SUBJECT: DEQ Authority to Develop and Implement Load Allocations for Forestland Sources

Question and Brief Answer

You have asked whether the Department of Environmental Quality (DEQ) has the legal authority to develop specific load allocations (LAs) and implementation measures for forestland owners. The question assumes the following facts: A waterbody within the coastal zone fails to meet water quality standards¹ for temperature, turbidity or suspended solids. Forestland operations on properties adjacent to the waterbody contribute significantly to the pollutant load that is responsible for the failure of the waterbody to meet standards. The DEQ has determined that statewide best management practices (BMPs) implemented by the Oregon Board of Forestry (BOF) under the Forest Practices Act (FPA)² are inadequate to ensure the achievement of water quality standards.

Based on these assumed facts, the DEQ would issue a total maximum daily load (TMDL) for the waterbody along with a water quality management plan (WQMP). Under the TMDL, the DEQ proposes to assign LAs to individual property owners—including forestland owners—adjacent to the waterbody as opposed to general LAs for the nonpoint source pollution sectors as has typically been done in previous TMDLs. The water quality management plan (WQMP) issued in conjunction with the TMDL would require each source to undertake an approved implementation plan specific to the property. The DEQ also would establish "safe harbor" BMPs or other control measures that it believes to be adequate to meet the LA to the maximum extent practicable.³ In the case of forestlands, if the Board of Forestry adopts best management practices that are at least as protective as the DEQ BMPs, compliance with the BOF BMPs

¹ In this memorandum, the term water quality standard is used in its narrow sense to mean only those standards required under Clean Water Act Section 303 (33 USC §1313) and the EPA's implementing rules adopted by the Environmental Quality Commission (EQC) under ORS 468B.035 and codified in OAR chapter 340, division 41.

² ORS 527.610 to CRS 527.785.

³ It is anticipated that the DEQ would consult with Oregon Department of Forestry when developing the safe harbor BMPs and in other matters relating to TMDL development and enforcement.

would constitute implementation of the LAs. If the BOF does not adopt basin-specific BMPs or if the DEQ finds that the BOF's BMPs are not as protective as the safe harbor BMPs, the DEQ will require the forestland owner to comply with the safe harbor BMPs, or to develop its own BMPs and submit them to the DEQ for review and approval.

As discussed in the Legal Analysis section below, we believe that the DEQ does have the legal authority to develop and enforce these source specific LAs for landowners, including owners of forestlands.

Background

Under the Coastal Zone Management Act,⁴ Oregon is required to develop and submit to the U.S. Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Agency (NOAA) a Coastal Nonpoint Source Pollution Control Plan.⁵ Under Clean Water Act (CWA) Section 319, the state is also required to develop and submit to the EPA a plan for the control of nonpoint source pollution.⁶ Under coastal zone statutes and the EPA's CWA guidance, a state's coastal nonpoint source plan is to be closely coordinated with its CWA Section 319 nonpoint source plan, and also with any TMDLs developed under CWA Section 303. Essentially, the coastal plan serves to update or supplement the Section 319 plan.

The DEQ has determined that water quality in a number of coastal basins fails to meet certain water quality standards including those for temperature and suspended sediment.⁷ Further, the EPA and NOAA have asserted that the coastal plan submitted by Oregon does not adequately protect water quality with respect to pollutant loads from operations on private forest lands, specifically with respect to riparian areas, landslide prone areas, and forest roads. Unless the State of Oregon takes action to resolve these concerns, the EPA and NOAA have indicated that they will consider the state to be out of compliance with these federal laws and they will withhold federal funds under the CZMA that are currently administered by the Department of Land Conservation and Development (DLCD) and funds under the CWA that are administered by the DEQ.⁸

Legal Analysis

Under the federal Clean Water Act, Oregon is required to develop general water quality standards that are adequate to protect designated uses as well as actual uses in existence as of 1975.⁹ Under the applicable statutes, the Environmental Quality Commission (EQC) is

⁴ 16 USC § 1451 to § 1466.

⁵ 16 USC § 1455(b).

⁶ 33 USC § 1329(b).

⁷ See DEQ's CWA Section 305(b) Report at <http://www.deq.state.or.us/wq/assessment/rpt0406.htm>.

⁸ 16 USC § 1455b(c); 33 USC § 1329. In addition, a suit filed by environmental groups against the EPA and NOAA is presently pending in the U.S. Federal District Court. It seeks an order requiring the agencies to withhold grant funds based on the lack of approval of Oregon's Coastal Plan. *NWEA v. Gutierrez*, C09-C17 (D. Or. 1/6/09).

⁹ 33 USC 1313 (CWA Section 303); 40 CFR 131.4(e); 40 CFR 131.6. These standards must then be approved by the EPA and to the extent that a state fails to adopt standards or adopts standards that are not adequately protective, the EPA will promulgate standards for the state. *Id.* 40 CFR part 131.

responsible for adopting these standards.¹⁰ The CWA includes several strategies designed to ensure that water standards are achieved and maintained. Point sources are generally prohibited from adding pollutants to waters of the United States without a National Pollutant System Discharge System (NPDES) permit.¹¹ Such permits must include technology based effluent limits and additional water quality based effluent limits when needed to ensure that the discharge will not cause or contribute to a violation of standards. Nonpoint sources, in turn, are typically subject to state management plans required by CWA Section 319.¹² Nonpoint source management plans typically use BMPs or similar control measures to reduce pollutants to the maximum extent practicable. There are also mechanisms for addressing water pollution from federal sources and activities.¹³

Oregon's statutes create a special relationship between the DEQ and the Oregon Department of Forestry (ODF) with respect to the regulation of water quality on state and privately held forestlands. The statutes require forest operations to be conducted in full compliance with water quality rules and standards adopted by the EQC.¹⁴ For nonpoint source discharges, the BOF is directed to develop best management practices that ensure, to the maximum extent practicable, that forest operations will be conducted in a manner that will not impair the achievement or maintenance of water quality standards. Thus, the BOF essentially develops the BMPs that are the basis of Oregon's Section 319 plan for controlling nonpoint sources pollution associated with state and private forest lands in order to meet water quality standards. The statutes also provide a mechanism for the EQC to petition the BOF for more effective BMPs in the event the Commission concludes that nonpoint source discharges from forest operation being conducted in accordance with current BMPs significantly contribute to WQS violations.¹⁵ To the extent that a forest operation is being conducted in compliance with applicable BMPs, operators are generally shielded from liability for violation of water quality standards.¹⁶

Clean Water Act Section 303 has additional provisions, generally referred to as the TMDL program, designed to address situations where standards are not being met despite the Section 402 and Section 319 programs discussed above.¹⁷ The CWA requires states to identify those waters of the U.S. where standards are not being met and where the effluent limits imposed under NPDES permits and the Section 319 Nonpoint Source Management Plan are not expected to bring the waterbody into compliance with the standards.¹⁸ Under this program, the CWA requires and Oregon statutes authorize DEQ to establish a TMDL with load allocations for the various sources of pollutants and to implement these allocations via implementation plans,

¹⁰ See ORS 468B.010; 468B.015; 468B.048. The standards are codified in OAR chapter 346, Division 41.

¹¹ CWA Sections 301 and 402 (33 USC §§ 1311, 1342).

¹² 33 USC § 1329.

¹³ See, e.g., CWA Section 313 (33 USC § 1323) governing federal facilities and activities and CWA Section 401 (33 USC § 1341) addressing federal licenses and approvals.

¹⁴ ORS 527.724.

¹⁵ ORS 527.765.

¹⁶ ORS 527.770. See also ORS 468B.05C (prohibiting violations of water quality standards)

¹⁷ 33 USC § 1313.

¹⁸ 40 CFR § 130.7.

permits and orders developed to bring the water body into compliance with the water quality standards.¹⁹

The water quality statutes generally give DEQ very broad authority to implement TMDLs.²⁰ With respect to operations on forestlands, however, neither the EQC nor DEQ may "promulgate or enforce any effluent limitations"²¹ or controls on nonpoint source discharges" from forest operations, unless controls imposed under the FPA are insufficient to meet the requirements of the Clean Water Act.²² The EQC's rules governing TMDLs also specify that the DEQ will look to the ODF to act as its designated management agency for implementation of TMDLs on state and private forestlands.

When the DEQ issues a TMDL, it is required to issue waste load allocations to point sources and load allocations to nonpoint sources that contribute significantly to the failure of the waterbody to meet standards.²³ These allocations, along with an accounting for natural background and a margin for safety, may not exceed the assimilative capacity of the waterbody.²⁴ DEQ also must develop plans to implement the allocations established in the TMDL.²⁵ The allocations in a TMDL are not water quality standards. They are measures designed to bring a waterbody that fails to meet water quality standards into compliance when the basic CWA provisions, e.g. NPDES permits and the Section 319 Nonpoint Source Plan are not expected to be adequate. Thus, the measures needed to implement load allocations under a TMDL for a specific basin, often will need to be more stringent than the general BMPs designed to maintain water quality standards under the Section 319 Plan.

DEQ is authorized and directed to establish load allocations and implementation requirements based on an individual sources of pollution or sectors of similar sources.²⁶ The rules specify, however, the ODF is expected to be the designated management agency that develops TMDL implementation plans for nonpoint source pollution from state and private forest operations and that it will use the authorities provided by the FPA.²⁷ Should ODF decline to act as the designated management agent, however, DEQ is authorized to establish its own implementation requirements to the extent required by the CWA and to the extent that controls adopted by the BOF under the FPA are deemed by DEQ to be inadequate to implement the TMDL. Thus in situations when the ODF is not carrying out the role of designated management agency and implementing BMPs adequate to implement the LA, DEQ may legally conclude, and in some cases likely must conclude, that implementation of its safe harbor BMPs is required.

¹⁹ 33 USC § 1313(d); ORS 468B.030; 468B.035; ORS 468B.110. Oregon's rules governing establishment and implementation of TMDLs are set out in OAR chapter 340, division 42.

²⁰ ORS 468B.010; 468B.030; 468B.110.

²¹ ORS 468B.110(2). The term "effluent limit" refers to a specific type of water quality permit condition and normally would not be used in the context of nonpoint source pollution controls. Its use in this context is somewhat unclear.

²² *Id.* (referencing ORS 527.765 and 527.700).

²³ 30 USC § 1313(d); 40 CFR § 130.7.

²⁴ OAR 340-042-0040.

²⁵ 33 USC § 1313(d)(1)(D); 40 CFR 131.7(d)(2).

²⁶ OAR 340-042-040(2)(b) and (1)(H); OAR 340-042-0080(1).

²⁷ OAR 340-042-0080(2).

Neil Mullane
July 2, 2010
Page 5

Conclusion

We conclude that DEQ is required to develop and implement LAs for nonpoint sources of pollution, including, when applicable, pollutant loads from operations on state and private forest lands. In fulfilling this legal requirement, DEQ is authorized to establish allocations for individual nonpoint sources. Based on the assumptions set out above, we conclude that the law would allow DEQ to identify BMPs or other control measures needed to implement source specific LAs, including allocations for forest operations. In keeping with statutory directives and the policies in the EQC's TMDL rules, however, the BOF would be given an opportunity to adopt new BMPs or control measures that are as effective as the safe harbor BMPs and that would be implemented by CDF. If the BOF does not promulgate such implementation measures, DEQ has the authority to directly order compliance with the load allocation because such measures are required by the CWA.

1076011

cc: Bob Bailey, DLCD
Marvin Brown, ODF